IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 29 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

FAROOQHUSAIN @ CHARSI AKHATARHUSAIN PATHAN

Versus

COMMISSIONER OF POLICE

Appearance:

MS BANNA S DUTTA for the Petitioner.

Mr.V.M.Pancholi, Assistant GOVERNMENT PLEADER, for Respondent No. 1-3

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 05/02/2003

ORAL JUDGEMENT

By filing this petition, the petitioner-detenu has challenged his detention order dated 7.5.2002. By the impugned order, the petitioner is detained under PASA as a "dangerous person". In the detention order, there is a reference about two criminal cases, which are

pending against the petitioner at Rakhial Police Station. Statements of witnesses were also recorded and the same are incorporated in the detention order.

The detaining authority has also mentioned in the order that the petitioner is in judicial custody in connection with two criminal cases, but it is stated that the petitioner is required to be detained by way of preventive detention.

At the time of hearing of this petition, Ms. Banna S. Dutta for the petitioner states that even though the petitioner is in judicial custody, the detaining authority has not properly addressed itself as to why the petitioner is required to be detained by way preventive detention. She further submitted that the detaining authority has not mentioned about its subjective satisfaction as to on what basis he is satisfied that in spite of the fact that he is in judicial custody, it is necessary to detain him under preventive detention. The detaining authority has not even mentioned in the order that the petitioner is likely to be released on bail in connection with the said two cases.

Learned Advocate for the petitioner has relied on the decision of the Apex Court in Amritlal & Others v. Union Government and others, AIR 2000 SC 3675. In paragraphs 4, 6 and 7, the Apex Court has observed as under :-

> " ... ...
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> 4. In Agustin's decision (1994 Supp (1) SCC 597) (supra) this Court also placed strong reliance on an earlier but oft-cited decision of this Court in Binod Singh v. District Magistrate, Dhanbad, (1986) 4 SCC 416 : (AIR 1986 SC 2090 : 1986 Cri LJ 1959) wherein it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. This Court held that there must be cogent materials before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention. It

is in this perspective as above, that the recording of the concerned officer in the matter under reference ought to be noticed and the same reads as below:-

> "Even though prosecution proceedings under Narcotic Drugs and Psychotropic Substances Act, 1985 have been initiated against Shri Amritlal I am satisfied that there is compelling necessity in view of the likelihood of his moving an application for bail and in the event of his being granted bail, the likelihood of his indulging in illicit traffic in narcotic drugs as is evident from the trend of his activities, to detain him under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988."
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> xxx xxx xxx

6. The requirement as noticed above in Binod Singh's case (AIR 1986 SC 2090 : 1986 Cri LJ 1959) (supra) that there is 'likelihood of the petitioners being released on bail' that however is not available in the reasonings as provided by the concerned officer. The reasoning available is the 'likelihood of his moving an application for bail' which is different from 'likelihood to be released on bail.' This reasoning, in our view, is not sufficient compliance with the requirements as laid down.

7. The emphasis however, in Binod Singh's case (supra) that before passing the detention order the concerned authority must satisfy himself of the likelihood of the petitioner being released on bail and that satisfaction ought to be reached on cogent material. Available cogent material is the likelihood of having a bail application moved in the matter but not obtaining a bail order.

... ..."

The detaining authority has not stated anything in the order as to why the it is necessary to detain the petitioner, even though he is in judicial custody and except mentioning that he is in judicial custody, there is no other reference in this connection in the detention order, and, therefore, this petition is required to be allowed.

This petition is accordingly allowed. The order of detention is quashed and set aside. It is ordered that the petitioner be released forthwith unless he is required in connection with any other case. Rule is made absolute.

5th February, 2003 (P.B. Majmudar, J.)

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(apj)